DERIENZO AND WILLIAMS, P.L.L.C.
State Bar #00510200
3681 N. ROBERT ROAD
PRESCOTT VALLEY, AZ 86314
TEL.: (928) 759-5572
FAX: (928) 759-5573
Email: yavapailaw@hotmail.com
Craig Williams
Attorney at Law

SANDRA L. CLARKHAM, CLERK
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. STEVEN DEMOCKER, Defendant.	**P1300CR201001325** **RESPONSE re: STATE'S MOTION ADMISSIBLE EVIDENCE** **(Hon. Warren Darrow)**

The Defendant, by and through undersigned counsel, hereby Responds to the state's "Motion For Admissible Evidence." The Defendant does not waive any of his Rights concerning Due Process of Law per the 5th and 6th Amendments of the U.S. Constitution, § 2, Articles 3, 4 and 24 of the Arizona Constitution, and the Arizona Rules of Criminal Procedure. The state's Motion was predictable as an attempt to circumvent prior and still valid Court Rulings. The Motion For Admissible Evidence should be denied in its entirety.

Rule 16.1(d), Arizona Rules of Criminal Procedure, states:

> **Finality of Pretrial Determinations.** Except for good cause, or as otherwise provided by these rules, *an issue previously determined by the court shall not be reconsidered.*

In the state's Motion for Admissible Evidence, the state gave ambiguously-stated reasons

to re-visit 5 Rulings by Judge Lindberg. Then, the state dealt with those individual Rulings collectively, in a one-size-fits-all "Legal Argument" section.

Rule 35.1 Motions, states:

> a. Unless otherwise specified in these rules, all motions ... shall contain a short, concise statement of the precise nature of the relief requested, shall be accompanied by a brief memorandum stating the *specific factual grounds* therefor and indicating the *precise legal points*, statutes, and authorities relied upon .... .

The state's new Motion for Admissible Evidence fails to provide this Court with any reason to re-visit prior Rulings. The Defendant has done his best to match each answer on each issue with the appropriate Court Ruling.

1. UBS E-mails

The Court precluded the UBS e-mails on March 2, 2010.

The state has not provided the particular e-mails as ordered by the Court, and the state simply saying it is relevant and there was a financial motive for the killing -- *which has always been their theory of the case* -- is not a change of circumstance, nor a specific factual ground, as required by Rule 35.1, *supra.*

2. Jennifer Rydzewski

On April 13, 2010, the state asked the Court to revisit the e-mail decision with regards to an UBS employee Jennifer Rydzewski. The Court ruled that: "It is too remote. I don't find it relevant. I will stay with the decision I made with regard to that." (R.T. 4/13/2010 Pretrial Motions, pg. 25, ln. 16-18).

The Court's Ruling was that the e-mail was not relevant. The simple passage of time from the mistrial to the new trial does not change that. The state simply saying the e-mail is probative is not a change in circumstance, nor a specific factual ground, as required by Rule 35.1,

supra, and it still is inadmissible.

3. Sorenson Testing for DNA from Defendant's bicycle.

On January 12, 2010, the Court gave an order regarding further DNA testing:

> "The Court believes that it is appropriate for the State to identify whether the testing is done, when it is done, whether any other tests are anticipated, and to communicate that information to Defense Counsel prior to the testing actually occurring."

(MEO, 1/12/10).

This order was then violated by the state in regards to the Defendant's bicycle seat. On May 28, 2010, the Court precluded the DNA test results from the Defendant's bicycle because of the violation of the Court's Order, as well as a discovery violation:

> The Court precludes the use of the results of that testing, having found that those actions described were in violation of the Court's orders with regard to disclosure of DNA evidence where the DNA evidentiary items were consumed. Though the *seat of the bicycle* may remain for testing, the Court finds it to be insufficient given the nature of the Court's understanding of the DNA testing that was accomplished and would have to be accomplished in this stage of the proceedings. The Court finds that there was a discovery violation and violation of the Court's orders. The Court will preclude the use of that testing and argument.

(MEO, 5/28/10, italic added).

The state's claim that the bike can be re-tested by the Defense is not a change in circumstance, nor a specific factual ground, as required by Rule 35.1, *supra*..

4. Communication by Defendant before, during and after the Homicide

What the state failed to say in this section, was that it had *recently* hired a new "expert" witness regarding cell phone usage. The Defense is awaiting its own report on this subject matter. The Defense requests that the Court not rule on this matter until the Defense has a chance to properly respond to this new evidence.

5. Statements of Barb O'Non

Nothing material has changed in Ms. O'Non's stories from the time of the Court Ruling on March 30, 2010. The state simply saying *Ms. O'Non will testify*, and a brief outline as to what they want her to testify to, is not a change in circumstance.

The state cites State v. King, 180 Ariz. 268 (1984) for the proposition that a subsequent judge can revisit the ruling of a previous judge, because of the "good cause" exception. However, there has not been any showing of new evidence, nor a "good cause" exception.

There still is no foundation for Ms. O'Non testimony on the issues outlined in the state's Motion for Admissible Evidence. Ms. O'Non's story is still unduly prejudicial. No a specific factual ground was given by the state in the Motion for Admissible Evidence, as required by Rule 35.1, *supra.*

Conclusion

The state spent a good deal of space on the phrase "the same case," implying that because *the state added new charges to the new Indictment* that the new case is not the same case.

However, this is the same murder case: same events, witnesses, and time-line that were well-known before the mistrial. The state had ample opportunities to litigate these issues previously, but it remains unsatisfied with the results of those hearings.

> Collateral estoppel prevents relitigation of an issue that was "actually litigated in a previous proceeding" if the parties had "a full and fair opportunity and motive to litigate the issue," "a valid and final decision on the merits" was entered, "resolution of the issue [was] essential to the decision," and the proceedings share a "common identity of the parties." Garcia v. Gen. Motors Corp., 195 Ariz. 510, 514, ¶ 9, 990 P.2d 1069, 1073 (App.1999)

Clusiau v. Clusiau Enterprises, Inc., 225 Ariz. 247, 249, 236 P.3d 1194, 1196 (Ariz.App. Div. 1,2010)

Collateral estoppel should prevent re-litigation of these issues. The Law of the Case

should survive.

For the above stated reasons, the Defendant objects to the state's Motion for Admissible Evidence in its entirety. Should the Court be inclined to seriously consider the state's Motion for Admissible Evidence, the Defendant requests an evidentiary hearing, where the state would have the burden of proof as to why any subsequent judge should change what Judge Lindberg so carefully ruled on. The Defendant request that should the Court entertain changing any previous ruling, that the Court make specific findings as to why.

RESPECTFULLY SUBMITTED this August 15, 2011.

Craig Williams
Attorney at Law

A copy of the foregoing delivered to:
Hon. Warren Darrow, Division PTB, Hon. David Mackey, Yavapai County Presiding Judge
Jeff Paupore, Steve Young, Yavapai County Attorney's Office
The Defendant
Greg Parzych, via e-mailed .pdf
by: _____